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Attorney for Defendants

Gary Fung and IsoHunt Web Technologies, Inc.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES

INDUSTRIES, INC., et al.

Plaintiffs,

vs.

GARY FUNG, et al.,

Defendants.

) **Case No. CV 06-5578 SVW(JCx)**

)

) **DEFENDANTS' MOTION TO**

) **STRIKE AND OBJECTIONS TO**

) **DECLARATION OF JANE**

) **SUNDERLAND IN SUPPORT OF**

) **PLAINTIFFS' SUPPLEMENTAL**

) **BRIEF IN SUPPORT OF SUMMARY**

) **JUDGMENT**

)

) Courtroom: 6

) Hon. Stephen V. Wilson

1 Defendants move to strike the entire “DECLARATION OF JANE
 2 SUNDERLAND PURSUANT TO THE COURT’S AUGUST 25, 2009 [ORDER]
 3 RE PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT ON LIABILITY”
 4 (“Sunderland declaration”) on the grounds that the substantive statements therein
 5 are not made on personal knowledge, do not set out facts that would be admissible
 6 in evidence and do not show that the affiant is competent to testify on the matters
 7 stated. Fed. R. Civ. P. 56(e). Statements made therein are hearsay, inadmissible
 8 under Federal Rule of Evidence 802 and other Rules of Evidence and should not be
 9 considered on a motion for summary judgment. *FDIC v New Hampshire Ins Co*,
 10 953 F.2d 478, 484 (9th Cir 1991); *Guthrie v. Darosa*, 1998 U.S. Dist. LEXIS 6004,
 11 C-96-0222-VRW (N. D. Cal. 1998).

12 In the alternative, defendants object to the following specific parts of the
 13 Sunderland declaration.

14 1. Defendants object to the entire Sunderland declaration on the grounds of
 15 lack of relevance. (FRE 401). Plaintiffs have failed to address the jurisdictional
 16 issue raised by the Court, namely, that “plaintiffs have the burden of alleging and
 17 proving that the infringement occurred in the United States” (Court’s Order of
 18 August 25, 2009 at 4:4-5) and that “in order for U.S. copyright law to apply, at least
 19 one alleged infringement must be completed entirely within the United States.” *Id.*,
 20 at 3:23-4:2, quoting from *Allarcom Pay Television, Ltd. v. General Instrument*
 21 *Corp.*, 69 F.3d 381, 387 (9th Cir. 1995).

22 Plaintiffs do not satisfy the requirements set forth by the Court. There is a
 23 complete lack of admissible evidence in the Sunderland declaration relating thereto.

24 2. Even as to what it purports to say, the Sunderland declaration is devoid
 25 of merit. The witness does not declare that Twentieth Century Fox has never
 26 prepared, promulgated or authorized any BitTorrent distribution of any material
 27 from or purporting to be from its motion pictures or television programs. Such a
 28 declaration would cover trailers and would also cover “spoofs” and other “anti-

1 piracy” files promulgated by plaintiffs and their agents to frustrate infringers. The
2 declarant leaves open the possibility that his company has prepared and
3 promulgated a BitTorrent trailer (advertisement) for its works, which has become
4 embodied in a dot-torrent file on defendant’s websites. The declarant leaves open
5 the possibility that promulgations have been made that are not “free and
6 unrestricted” but that have insignificant restrictions or purported charges associated
7 therewith.

8 3. Defendants further object in that such information was not provided in
9 discovery and thus defendants are unfairly prejudiced by the same and such should
10 be excluded from consideration in the instant motion for summary judgment.

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12 Dated: September 22, 2009

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